A NOTE ON LOCAL PRACTICE IN ADVERSARY PROCEEDINGS IN THE MIDDLE DISTRICT OF ALABAMA

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Last year I published two monographs on practice issues. The first was on motion practice and the second was on proofs of claims. The reaction from the bar has been positive so I have written this third note. The purpose of this monograph is to make counsel aware of what is expected of them when they bring or defend an adversary proceeding in this Court. For starters, counsel should review the Bankruptcy Rules, particularly the 7000 and 9000 series. In addition, counsel should become familiar with every Bankruptcy Code section which applies to the particular adversary proceeding. This is not a complete treatise on the subject, rather it is practical advice, with an emphasis on frequently observed errors.

1. Drafting Tips

Before counsel begins the process of drafting the pleading, she should have resolved two things. First, she should have a clear idea what she hopes to accomplish. Second, she should conduct sufficient legal research to determine whether the law provides for the remedy which she seeks. Once these two tasks have been completed, counsel is ready to begin the process of drafting her complaint. The following a list of the most common drafting flaws.

A. Caption. Adversary Proceedings have a unique format. See Forms 16C and 16D of the Official Forms. An adversary proceeding is a lawsuit within a bankruptcy case. If the pleadings are not properly captioned, they will likely be filed in the main case and may be overlooked by the Court. The Court has entered default judgments because counsel unfamiliar with the rules have improperly captioned their answers and the answers were then not filed in the appropriate adversary proceeding file.

B. Core proceedings. A core proceeding is one which goes to the core of the Bankruptcy Court's jurisdiction. The most common types are listed at 28 U.S.C. § 157(b)(2). The complaint should state whether the cause of action is "core" or "noncore." FED. R. BANKR. P. 7008(a). If the pleader alleges that the matter is noncore, she should further state whether or not the plaintiff consents to entry of a final judgment by the bankruptcy judge. The answer should admit or deny whether the matter is core or noncore. If the matter is noncore, the answer should state whether or not the defendant consents to entry of final judgment by the bankruptcy judge. As a general rule, core proceedings are those which would not exist but for the existence of a bankruptcy case, while noncore proceedings could have been brought in an appropriate court even if no bankruptcy case had been filed.

C. Bankruptcy Code sections. It is a good practice to cite the applicable Bankruptcy Code sections in order to put the Court and opposing counsel on notice of precisely what is at issue. For example, in an adversary proceeding to determine whether an indebtedness is excepted from discharge, the plaintiff should cite the appropriate subpart of Section 523(a). For example, an exception to discharged based upon fraud is governed by 11 U.S.C. § 523(a)(2).

D. Objections to discharge verses the determination of the dischargeability of an individual debt. One common mistake is the failure to grasp the difference between an objection to discharge and an adversary proceeding to determine whether a given indebtedness is excepted from discharge. An objection to discharge is governed by Section 727(a). If the plaintiff prevails, the debtor is denied his discharge. This means that he still owes all of the debts that he owed as of the date he filed his petition in bankruptcy. An exception to discharge is governed by Section 523(a). A plaintiff who prevails in a Section 523(a) proceeding receives a determination that the debt owed to him is "excepted" from discharge. This means that only the debt owed to the plaintiff survives the debtor's discharge. The remainder of the debtor's debts are discharged.

E. Long laundry lists of Bankruptcy Code sections. The opposite problem of the failure to list any Bankruptcy Code sections is listing them all, or at least a large number of Code sections. Counsel may plead as many theories for relief as the facts will support. However, the plaintiff may not harass her opponent, nor burden the Court, with pleadings which contain long lists of Bankruptcy Code sections which have no bearing on the proceeding at hand.

F. Pleading. A complaint should consist of a "short and plain" statement of the grounds for the Court's jurisdiction, a "short and plain" statement of the claim and a concise demand for the relief sought. The most common mistake here is to make conclusory statements without any factual allegations in support. For example, if the plaintiff alleges that the debt owed should be excepted from discharge pursuant to Section 523(a)(2), for fraud, he should allege facts in support of his claim. Many complaints will allege fraud in general terms without making any attempt to describe the false statement which gave rise to the claim. Lately, I have noticed that some pleadings have become exceedingly

verbose. I recently conducted a pretrial hearing in a relatively simple matter in which the complaint contained 15 counts and nearly 100 paragraphs. Not to be outdone, the answer alleged more than 50 defenses. Repetitive counts and defenses should be eliminated during the drafting phase. One final note: the numbered paragraphs of the answer should correspond to the numbers used in the complaint. Paragraph 1 of the answer should respond to paragraph 1 of the complaint. It is a poor practice to list all paragraphs of the complaint which are admitted in one paragraph and in another, list all which are denied. This inevitably leads to confusion as to what is admitted and what is still in issue.

2. Service of Process

Shortly after the filing of a complaint in an adversary proceeding, the Clerk will send a summons to the Plaintiff's lawyer. The Bankruptcy Rules permit service by first class mail. Counsel should bear in mind that service of process must be completed within 10 days of the issuance of the summons. Service of process is complete upon mailing. Plaintiff's counsel should file a Return of Service promptly upon completion of service. The complete name and address of each party served should be indicated on the Return of Service. Counsel should make themselves familiar with Bankruptcy Rule 7004.

Given the ease with which a party may be served under the Bankruptcy Rules, it is surprising how often it is not done properly. Judge Massey from Atlanta wrote an excellent monograph on service of process which we have put on the Court's website. I believe the monograph is a "must read" for anyone who intends to try adversary proceedings in Bankruptcy Court. I will note here the three errors which I have observed most often. First, service must be completed within 10 days of the date the Clerk issues the summons. FED. R. BANKR. P. 7004(e). Counsel frequently miss this important deadline. Second, corporations frequently are served improperly. Service must be made on

an officer or registered agent. FED. R. BANKR. P. 7004(b)(3). One may not simply mail a copy of the summons and complaint to the address where payments are mailed. Third, if the debtor or debtors are defendants, copies must be mailed to each debtor and his lawyer. FED. R. BANKR. P. 7004(b)(9).

Plaintiff's counsel should move to default each party who fails to timely answer or plead. Adversary Proceedings which are "sitting dead in the water," without proof of service, an answer or a motion for default judgment are subject to dismissal for want of prosecution. If counsel need a short period of time to attempt to settle they should contact the Court.

3. Timing

When a pleading or paper must be filed or served is governed by the Bankruptcy Rules concerning timing. There are two timing rules in bankruptcy proceedings which are different than in cases in district court. These two differences frequently trip up unwary lawyers. First, an answer must be served within 30 days of issuance of the summons. This is why the rule on when a summons and complaint must be served is so important. Counsel frequently count their 30 days from receipt of the summons and complaint and therefore are late with their answer. Second, intermediate Saturdays, Sundays and holidays are excluded only if the pertinent period of time is less than 8 days. FED. R. BANKR. P. 9006(a). In contrast, in district court intermediate Saturdays, Sundays and holidays are excluded if the pertinent period of time is less than 11 days.

This rule may be illustrated as follows. Assume that the court enters judgment on July 1, 2003. If the losing party wants to file a motion to alter or amend the judgment, it must be filed within 10 days of entry of judgment. This period of time is the same whether one is in bankruptcy court or district court. FED. R. BANKR. P. 9023; FED. R. CIV. P. 59. However, because of the counting convention on

the exclusion of intermediate Saturdays, Sundays and holidays, the actual due date is different. In this illustration, the motion to alter and amend must be filed in bankruptcy court not later than July 11, 2003. On the other hand, a motion to alter and amend in district court would be timely if filed by July 16, 2003, as the intermediate Saturdays and Sundays as well as Independence Day are not counted.

4. Pretrial Proceedings

The Court will set a scheduling conference after a responsive pleading is filed. The Court usually does not require a Rule 26(f) report, however, the Court does expect that counsel will confer in advance to discuss the possibility of settlement as well as general management matters such as limits on discovery and scheduling for trial. Written discovery plans are not usually required but are always welcome. Counsel should be prepared to respond to any pending motions at the scheduling conference. Counsel should have their calendars with them and must make the Court aware of any potential scheduling problems. If any of the parties or witnesses have special needs, the Court should be made aware of this at this time.

Scheduling Conferences frequently are set on telephonic dockets. Because they are usually short and evidence is not taken, they lend themselves to telephonic dockets. Counsel should set aside one hour for the conference. It is my view that counsel are obligated to make themselves available as if they were in court and that the unavailability for a telephonic conference is treated the same as a failure to appear for a hearing in court.

After the Scheduling Conference, the Court will enter a pretrial order which will govern subsequent proceedings. The Court will usually set deadlines for filing and serving items such as lists of

witnesses and exhibits. Exhibits or witnesses which are not disclosed on a timely filed list may be excluded. See FED. R. CIV. P. 16(e).

Adversary Proceedings which are deep set on a trial docket will usually be set for a final pretrial conference approximately two weeks prior to the beginning of the trial calendar. These conferences are usually set on a telephonic docket. If counsel would prefer to conduct the conference in court, he should make the Court aware of his preference at the Scheduling Conference. Adversary Proceedings which have not been disposed of by way of settlement or dispositive motions will be assigned trial sequence at the final pretrial conference. Counsel are responsible for having their clients and witnesses ready when the case is called for trial.

5. Discovery

The discovery phase of a lawsuit is the phase most subject to abuse. The guidelines for civil discovery which are published on the District Court's web page are applicable here. Counsel are encouraged to exchange freely documents without the necessity of engaging in formal discovery. For example, if the value of property is in issue, counsel should produce all available documents relating to value without requiring the issuance of a request for production of documents. Counsel should not assume that joint motions to extend the discovery period will be granted as a matter of course.

6. Trial Settings

Trials will either be specially set or "deep set." A trial which is specially set is the only trial scheduled for that time. This Court is in the process of changing its practice whereby all cases were specially set to the current practice where most trials are "deep set" on a trial calendar. A trial calendar will usually be one or two weeks in length and between five and twenty adversary proceeding trials will

be scheduled on a given trial calendar. Cases set on a trial calendar will usually be called for a final pretrial conference between one and two weeks prior to the trial setting. As mentioned above, cases which are not settled or disposed of by dispositive motion will be given a sequence for trial at that time. The trial calendar docket will be posted on the Court's web site. Counsel who settle cases after the final pretrial conference should telephone promptly the Courtroom Deputy and make him aware of the settlement.

7. Continuances

Continuances are the bane of efficient calendar management for any court and are granted only upon a showing of good cause. Trials are usually scheduled many months in advance and should generally take precedence over other matters which may arise at a later time. Lawyers should have their calendars available at the scheduling hearing so that scheduling conflicts may be avoided. Once a matter is set for trial, the Court expects that counsel will make judges of other courts aware of the trial setting.

If it becomes necessary to move for a continuance, the lawyer should first telephone opposing counsel and solicit his agreement. A motion for a continuance should indicate whether or not opposing counsel has agreed to the requested continuance. Counsel should bear in mind that the agreement of opposing counsel does not guarantee that a continuance will be granted. The motion should state with particularity the reason for the needed continuance. If a conflict with another trial setting has arisen, the style of the case, the name of the court and the specifics as to how the conflict came about should be provided. If the conflict is the result of a personal emergency, counsel need not provide a full medical history.

8. Settlement

Cases which are settled may be disposed of in one of two ways. First, the parties may submit a stipulation of dismissal signed by all parties of record. Once counsel has obtained an agreement, he should prepare the stipulation. If the stipulation is filed electronically, the signatures of counsel may be indicated with a /s/ signature line. However, counsel may not submit a stipulation of dismissal with a /s/ signature unless he has an express agreement with each opposing counsel. The stipulation of dismissal should state whether the dismissal is with or without prejudice.

Second, in the case of Adversary Proceedings which are settled with a consent judgment, a proposed form for a consent judgment should be submitted to the chambers e-mail box. The consent judgment should contain only a statement as to the disposition of the Adversary Proceeding and should not contain lengthy recitations of facts or a recounting of the history of the case.[1] Chambers e-mail addresses are as follows.

Judge Sawyer wrs@almb.uscourts.gov

Judge Williams dhw@almb.uscourts.gov

It is a good practice to file a joint motion for entry of the consent judgment so that the record is clear. Counsel may file, in a separate document, a stipulation of facts but the Court does not usually require one.

[1] For example, "Judgment is entered in favor of Plaintiff John Doe, the Court determines that Joe Debtor is indebted to the plaintiff in the amount of $1,000, and that this indebtedness is excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A)."

9. Trial Procedures

Counsel are expected to be in Court at the prescribed time ready for trial. Parking in the vicinity of the Courthouse and construction on Interstate Highways 65 and 85 are perennial problems. Counsel are expected to take these matters into account and plan accordingly.

Counsel should have their exhibits premarked and exchanged with opposing counsel prior to the start of trial. Exhibit stickers are available from the Courtroom Deputy. Exhibit Books, notebooks where documentary exhibits are collected and organized, are an excellent idea. The Court has not prescribed a format for exhibit numbers, but it is suggested that exhibit designations be kept as simple as possible. For example, Exhibits 1, 2, 3 or A, B, C are preferable to Exhibit 3(d)(7). The Court has an evidence presenter which is available. Counsel who desire to use the Court's evidence presenter should contact the Courtroom Deputy in advance to make sure it is available for trial. In addition, counsel may schedule a practice session in advance to make sure that all goes smoothly at trial.

Motions in limine or other pretrial motions should be filed long enough in advance so that the Court and opposing counsel have time to consider them. Motions which are filed on the eve of trial, catching the Court and opposing counsel by surprise, are not well received and are usually denied.

Trial briefs are usually not required but are welcome. If a trial brief is filed with the Court, a copy must be served upon opposing counsel. Trial briefs are most useful if filed far enough in advance to permit the Court time to read the brief prior to trial. Trial briefs should be just that–brief. Lengthy "canned" briefs with dense string cites and page long footnotes are not well received. A good trial brief contains a discussion of what counsel believes he will prove at trial and a carefully focused discussion of the pertinent legal issues. Discussion of legal issues should concentrate on the pertinent sections of the

Bankruptcy Code and any pertinent reported decisions of the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit.

Opening statements are frequently waived if the issues are simple. If Counsel elects to make an opening statement it should be brief and to the point, a preview of what counsel expects his evidence to show as well as any matters which counsel believe merit special attention. Opening statements should not be argumentative. Under no circumstances should counsel engage in ad hominem attacks upon opposing counsel or other parties.

The testimony of witnesses is taken formally. The witness takes the stand and is sworn. The lawyer who calls the witness stands at the podium and asks his questions from the podium. If reference is to be made to documents, they should be handed to the witness in advance. Otherwise, counsel should request permission to approach the witness. When counsel approaches a witness he should hand him what is necessary and then return to the podium to ask his questions. Counsel may not stand over a witness and question him. Counsel should not echo the witnesses' answers, either to underscore testimony which he likes, or sarcastically, to disparage testimony which is not to his liking. Counsel may vigorously cross examine an adverse witness but should not argue with him.

Counsel should address their remarks to the Court and not to other counsel. Counsel should stand when they address the Court, make objections or examine witnesses. Counsel with health concerns which make it impracticable to stand or require more frequent recesses should make the Court aware these concerns in advance. Counsel should not interrupt one another while arguing motions or objections. Evidentiary objections should be narrowly focused to address the rule of evidence which the objecting counsel believes bars the proffered testimony or exhibit. Objections

should not sound like mini-closing arguments tailored to disrupt the flow of the trial. The "best evidence" rule does not mean that any given document or bit of testimony must be the best means of proving a given fact. Rather, the "best evidence" rule concerns the use of copies rather than an original. Given the pretrial procedures used by this Court, "best evidence rule" objections should be a rare occurrence. See FED. R. EVID. 1003, 1004.

Counsel are encouraged to use summaries when the subject matter is complex. See FED. R. EVID.1006. It is a poor practice to offer voluminous records, without analysis, into the record, leaving it to the Court to do the heavy lifting of analyzing the data. Complex mathematical calculations should be made in advance of trial with copies provided to opposing counsel.

The Court expects that closing arguments will be a spirited clash of each party's view of the factual and legal issues. Counsel are expected to challenge the credibility of witnesses without disparaging their character. Counsel may attack the validity of opposing counsel's legal argument without engaging in a personal attack. Indeed, the term "closing argument" is something of a misnomer. The purpose of a closing argument is to permit counsel to marshal the evidence in such a manner as to support his legal theory and thereby win the case. Counsel who are argumentative to the point of being unpleasant usually detract from their presentation.

In some cases, the Court will request each party to file proposed findings of fact and conclusions of law. Such documents shall be entitled something to the effect of "Plaintiff John Doe's Proposed Findings of Fact and Conclusions of Law," and shall bear the signature of at least one lawyer of record, with copies served upon each opposing counsel and the original filed with the Clerk. Counsel should not submit proposed findings directly to chambers in a form for the judge's signature

unless specifically requested. Any communication with the Court shall be copied to opposing counsel with an appropriate indication on the document.

The Court will hold exhibits until its judgment becomes final. Parties who want their exhibits returned to them should contact the Courtroom Deputy. Exhibits which have not been picked up will be destroyed 60 days after judgment becomes final.